SUPREME COURT OF THE UNITED STATES

No. 00–1167

TAHOE-SIERRA PRESERVATION COUNCIL, INC., ET AL., PETITIONERS *v.* TAHOE REGIONAL PLANNING AGENCY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 23, 2002]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

I join the CHIEF JUSTICE'S dissent. I write separately to address the majority's conclusion that the temporary moratorium at issue here was not a taking because it was not a "taking of 'the parcel as a whole.'" *Ante*, at 27. While this questionable rule* has been applied to various alleged regulatory takings, it was, in my view, rejected in the context of *temporal* deprivations of property by *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, 318 (1987), which held that temporary and permanent takings "are not different in kind" when a landowner is deprived of all beneficial use of his land. I had thought that *First English* put to rest the notion that the "relevant denominator" is land's infinite

*The majority's decision to embrace the "parcel as a whole" doctrine as *settled* is puzzling. See, *e.g.*, *Palazzolo* v. *Rhode Island*, 533 U. S. 606, 631 (2001) (noting that the Court has "at times expressed discomfort with the logic of [the parcel as a whole] rule"); *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1016, n. 7 (1992) (recognizing that "uncertainty regarding the composition of the denominator in [the Court's] 'deprivation' fraction has produced inconsistent pronouncements by the Court," and that the relevant calculus is a "difficult question").

life. Consequently, a regulation effecting a total deprivation of the use of a so-called "temporal slice" of property is compensable under the Takings Clause unless background principles of state property law prevent it from being deemed a taking; "total deprivation of use is, from the landowner's point of view, the equivalent of a physical appropriation." *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1017 (1992).

A taking is exactly what occurred in this case. No one seriously doubts that the land use regulations at issue rendered petitioners' land unsusceptible of *any* economically beneficial use. This was true at the inception of the moratorium, and it remains true today. These individuals and families were deprived of the opportunity to build single-family homes as permanent, retirement, or vacation residences on land upon which such construction was authorized when purchased. The Court assures them that "a temporary prohibition on economic use" cannot be a taking because "logically . . . the property will recover value as soon as the prohibition is lifted." *Ante*, at 27–28. But the "logical" assurance that a "temporary restriction . . . merely causes a diminution in value," *ante*, at 27, is cold comfort to the property owners in this case or any other. After all, "*[i]n the long run* we are all dead." John Maynard Keynes, Monetary Reform 88 (1924).

I would hold that regulations prohibiting all productive uses of property are subject to *Lucas*' *per se* rule, regardless of whether the property so burdened retains theoretical useful life and value if, and when, the "temporary" moratorium is lifted. To my mind, such potential future value bears on the amount of compensation due and has nothing to do with the question whether there was a taking in the first place. It is regrettable that the Court has charted a markedly different path today.